

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Supra Telecommunications and Information Systems, Inc. (U-6100-C) and H.I.G. Supra, Inc., for Approval to Complete a Transfer of Control of an Authorized Telecommunications Carrier.

Application 04-12-009
(Filed December 1, 2004)

OPINION APPROVING TRANSFER OF CONTROL**Summary**

This Decision grants prospective authority under Pub. Util. Code § 854¹ for H.I.G. Supra, Inc. (H.I.G.) and FDN Supra, LLC, (FDN) to acquire Supra Telecommunications and Information Systems, Inc. (Supra).

Procedural Background

Application (A.) 04-12-009 was filed on December 1, 2004. Notice of A.04-12-009 appeared in the Daily Calendar on December 20, 2004. There were no protests or other responses. Supplements to A.04-12-009 were filed on March 2, March 29, and May 6, 2005, pursuant to instructions from the assigned Administrative Law Judge (ALJ).

¹ All statutory references are to the Public Utilities Code unless otherwise indicated.

Description of the Applicants and the Proposed Transaction

In A.04-12-009, as supplemented, H.I.G., FDN, and Supra (collectively, Applicants) request authority under Section 854 for H.I.G. and FDN to each acquire a 50% interest in Supra. Supra is authorized by Decision (D.) 98-12-083 to provide (1) interexchange services statewide, and (2) facilities-based and resold local exchanges services in areas served by Verizon California Inc. and SBC California. Supra currently has no customers in California.²

In October 2002, Supra filed for protection under Chapter 11 of the U.S. Bankruptcy Code. Supra's Plan of Reorganization (POR) was approved by the Bankruptcy Court in October 2004. Under the POR, H.I.G. will own 90% of Supra. The remaining 10% interest will be divided among several investors, none of whom will hold more than 5%. On March 21, 2005, the Applicants consummated the transaction in accordance with the POR but without Commission authorization.³ Subsequently, H.I.G. sold to FDN a 49% stake in Supra and the right to purchase an additional 1%.

H.I.G. was established to implement Supra's POR. H.I.G. is part of the H.I.G family of companies that together comprise a private equity investment firm with more than \$1.5 billion of equity capital under management. The Applicants represent that H.I.G., through its parent company, has substantial operating, consulting, technology, and financial management experience.⁴

² Supplement filed on May 5, 2005, p. 2.

³ E-mail from the Applicants dated March 2, 2005.

⁴ Decision 04-11-010 and D.04-11-004 authorized H.I.G. affiliates to acquire Evercom Systems, Inc. (U-6888-C) and T-NETIX Telecommunications Services, Inc. (U-5324-C), respectively.

FDN was established to purchase a 50% stake in Supra. FDN is a subsidiary of Florida Digital Network, Inc. d/b/a FDN Communications (FDN Communications.). FDN Communications provides telecommunications services to more than 50,000 businesses in Florida and central Georgia.

The Applicants state that the transaction will not affect the rates, terms, or conditions of Supra's services. The Applicants also assert that the transaction will strengthen Supra financially, which will help Supra to compete against much larger and better capitalized incumbent providers in California. The Applicants believe that by invigorating competition in California, the transaction will benefit all consumers.

Discussion

The Applicants request authority under § 854 for H.I.G. and FDN to acquire Supra. Section 854 states, in relevant part, as follows:

No person or corporation...shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission...Any merger, acquisition, or control without that prior authorization shall be void and of no effect.

The purpose of § 854 is to enable the Commission to review a proposed transaction, before it takes place, in order to take such action as the public interest may require. The Commission has broad discretion under § 854 to approve or reject a proposed transaction. Where necessary and appropriate, the

Commission may attach conditions to a transaction in order to protect and promote the public interest.⁵

The Commission uses several criteria to decide whether to approve a proposed transaction that will result in an entity without a certificate of public convenience and necessity (CPCN) acquiring a nondominant telecommunications utility that has a CPCN to provide facilities-based telecommunications services.⁶ First, the acquiring entity must have at least \$100,000 of cash or cash equivalent as set forth in D.95-12-056, Appendix C, Rule 4.B. The Applicants provided information under seal which demonstrates that this requirement has been satisfied.

Second, the acquiring entity must be able to operate the acquired utility competently. The Applicants represent that both H.I.G. and FDN, through their parent companies, have substantial operating, consulting, technology, and financial management experience. The Applicants also state that they will employ David Struwas to serve as the chairman of Supra. The resume for Struwas provided by the Applicants shows that Struwas has many years of experience in managing telecommunications companies.⁷ Based on this information, we find that the second criterion has been satisfied.

Third, the utility being acquired should not be delinquent in the remittance of public program surcharge revenues collected from customers. Commission staff reports that (1) Supra has informed the Commission that Supra has not had

⁵ D.01-06-007, 2001 Cal. PUC LEXIS 390, *24.

⁶ D.03-06-079, *mimeo.*, pp. 7 – 8.

⁷ We did not find any adverse information regarding Struwas in our search of the Lexis data base of FCC and state commission decisions.

any surchargeable revenues since 1998, and thus owes no surcharges; and (2) Supra's annual regulatory reports for 2003 and 2004 show that it did not provide service or collect any revenues during those years. Based on this information, we find that the third criterion has been satisfied.

Finally, the Commission considers if any affiliate, officer, director, partner, or owner of more than 10% of the acquiring entity, or any person acting in that capacity, has (1) filed for bankruptcy; (2) been sanctioned by the FCC or state utility regulatory commission for failure to comply with any statute, rule or order; or (3) been found civilly liable for a violation of § 1700 *et seq.* of the California Business and Professions Code or for any actions that involved misrepresentations to consumers, or is currently under investigation for similar violations. The Applicants represent that there is no such person or entity with respect to Items 1 and 3. Our search of Lexis did not find anything that contradicts the Applicants' representation.

Our search of Lexis found five instances of actual or alleged violations of regulatory statutes outside of California.⁸ First, in 2001 the FCC found that Supra had violated the FCC's rules when it failed to disclose pertinent information in its application for paging spectrum. As a result of its finding, the FCC dismissed Supra's application.⁹ Second, in 1998 the Florida Public Service Commission (PSC) adopted a settlement agreement in which Supra agreed to pay a "voluntary contribution" of \$45,000 to settle 201 instances of alleged slamming.¹⁰

⁸ There is nothing in the record of this proceeding which indicates that any of the Applicants have failed to comply with any statute, rule, or order in California.

⁹ 2003 FCC LEXIS 1153, DA 03-636.

¹⁰ 1998 Fla. PUC LEXIS 679. Supra admitted no wrong doing, but agreed to refund all amounts paid by affected customers, thereby giving the customers free service. (Ibid.)

Third, in 2001 the Florida PSC adopted a settlement agreement in which Supra agreed to pay a “voluntary contribution” of \$9,000 to settle allegations that it had not responded to six consumer complaints.¹¹ Fourth, in 2002 Supra failed to timely file an annual report in Ohio.¹² Finally, in 2003 the Florida PSC required FDN Communications to refund \$15,277.34 to its customers, including interest, for overcharging calls by 0.10 minute.¹³

Although troubling, we do not find the Applicants’ violation of regulatory statutes in other jurisdictions sufficient cause to deny A.04-12-009. This is because four of the five violations involved Supra, the entity being acquired. The acquisition of Supra by H.I.G and FDN, which have a better record of compliance, may improve Supra’s compliance in the future. Additionally, it appears the worst violations occurred in Florida. If the Florida PSC had taken stern action, such as levying a large fine or revoking a CPCN, this would show that the Florida PSC considered the violations to be very serious. Given that the Florida PSC did not take stern action, our concerns are ameliorated. We remind the Applicants that they must comply with all applicable California regulatory statutes, rules, and orders, and that the Commission may impose fines and other sanctions if they fail to do so.

In conclusion, we find that H.I.G and FDN should be authorized to acquire Supra pursuant to § 854 for the following reasons. First, the transaction satisfies

¹¹ 2001 Fla. PUC LEXIS 805. Supra ultimately responded satisfactorily to the six consumer complaints. (Ibid.)

¹² 2002 Ohio PUC LEXIS 242.

¹³ 2003 Fla. PUC LEXIS 775. The Florida PSC in 1988 and 1989 took several adverse actions against a company named FDN. The Applicants represent that those actions were against a different company with the same name. The Applicants state that FDN Communications was founded in 1998, and that the previously cited adverse actions pre-date 1990.

the applicable criteria as described previously. Second, there will be no changes to Supra's rates or services as a result of the transaction. Thus, the public will not be harmed by the transaction. Third, the public may benefit from the transaction to the extent it enhances Supra's ability to compete in California. Fourth, there is no opposition to A.04-12-009. Finally, California reaps enormous benefits from the services provided by public utilities. Thus, it is in the public interest to foster a business climate in California that is hospitable to utilities. Accordingly, ordinary transactions that are subject to § 854, like the one before us here, should be approved absent a compelling reason to the contrary. No such reason has been alleged or shown in this proceeding.

Violation of Pub. Util. Code § 854

The Applicants violated § 854 when they consummated the transaction on March 21, 2005, without Commission authorization. Section 854 states, in relevant part, as follows:

No person or corporation...shall...acquire...any public utility organized and doing business in this state without first securing authorization to do so from the commission. ...Any...acquisition...without that prior authorization shall be void and of no effect.

As required by § 854, H.I.G and FDNs' acquisition of Supra is void and of no effect prior to the effective date of this Decision. The Applicants are at risk for any adverse consequences that may result from the transaction being deemed void prior to the effective date of this Decision.

The Commission may levy fines for violations of § 854. Here, the record indicates that the Applicants took reasonable steps to comply with § 854 by filing A.04-12-009 more than three months before the transaction was consummated on March 21, 2005. The record also indicates that the POR required the Applicants

to complete the transaction by March 21, 2005. Because the Applicants endeavored to comply with § 854, we conclude that the Applicants should not be fined for violating § 854.

California Environmental Quality Act

Application 04-12-009 does not propose, and this Decision does not grant, authority for new construction. Accordingly, there is no possibility that granting A.04-12-009 will have a significant impact on the environment.

Categorization and Need for Hearings

In Resolution ALJ 176-3145, dated January 13, 2005, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings were not necessary. Based on the record, we affirm that this is a ratesetting proceeding and that hearings are not necessary.

Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Timothy Kenney is the assigned ALJ in this proceeding.

Comments on the Draft Decision

This is an uncontested matter in which the Decision grants the relief requested. Therefore, the otherwise applicable 30-day period for public review and comment is waived pursuant to § 311(g)(2).

Findings of Fact

1. Application 04-12-009 requests authority under § 854 for H.I.G. and FDN to acquire Supra. There were no protests or other responses to A.04-12-009.
2. As set forth in the body of this Decision, the proposed transaction satisfies the Commission's requirements.

3. The Applicants consummated the transaction on March 21, 2005, in accordance with the POR approved by the Bankruptcy Court. The transaction was consummated without prior approval from the Commission.

4. The Applicants took reasonable steps to comply with § 854.

5. Application 04-12-009 does not request, and this Decision does not grant, authority to construct any buildings or other facilities.

Conclusions of Law

1. This is a ratesetting proceeding.

2. No hearing is necessary.

3. It is in the public interest to approve A.04-12-009 pursuant to § 854.

4. The Applicants violated § 854 when they consummated the transaction on March 21, 2005, without Commission authorization. As required by § 854, the transaction is void and of no effect prior to the effective date of this Decision.

5. Because the Applicants took reasonable steps to comply with § 854, the Applicants should not be fined for violating § 854.

6. It can be seen with certainty that approving A.04-12-009 will not have any adverse impact on the environment.

7. Because A.04-12-009 is uncontested and noncontroversial, the following Order should be effective on the date it is signed.

O R D E R

IT IS ORDERED that:

1. Application 04-12-009 for authority under California Pub. Util. Code § 854 to transfer control of Supra Telecommunications and Information Systems, Inc. to H.I.G. Supra, Inc. and FDN Supra, LLC is granted.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.